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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re EARL L. et al., Persons Coming Under the Juvenile Court Law.	B172287 (Super. Ct. No. LK04690)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. NERISSA H. et al., Defendants and Appellants.	

APPEAL from an order of the Superior Court of Los Angeles County, Daniel Zeke Zeidler, Juvenile Court Referee. Affirmed.

Anna L. Ollinger, under appointment by the Court of Appeal, for Defendant and Appellant Nerissa H.

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*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II and III.

Mary Elizabeth Handy, under appointment by the Court of Appeal, for Defendant and Appellant Earl L., Senior.

Office of the County Counsel, Larry Cory, Assistant County Counsel, and Pamela Landeros, Deputy County Counsel, for Plaintiff and Respondent.

Nerissa H. (Mother) and Earl L., Sr., (Father; collectively Parents) appeal from the order terminating their parental rights over Earl L. and Earllia L., which freed them for adoption.

Parents contend the juvenile court violated their rights to due process (U.S. Const., 14th Amend.) by requiring them to make an offer of proof before setting a contested hearing to determine whether the sibling exception (Welf. & Inst. Code, § 366.26, subd. (c)(1)(E))[1] applied. They also contend that setting Earl L. and Earllia L. free for adoption would be detrimental in light of their strong bond with two older half-siblings, Jamesha T. and Jesse T.

Based on our review of the record and applicable law, we affirm the order. In particular, we conclude that the offer of proof procedure set forth in our earlier decision of *In re Tamika T.* (2002) 97 Cal.App.4th 1114 applies to the sibling exception to termination of parental rights.

FACTUAL AND PROCEDURAL SUMMARY

Mother has five children. In descending order of age, they are Unesha L.; Jamesha T.; Jesse T.; Earl L.; and Earllia L. Jamesha T. and Jesse T. share the same father. Earl L. and Earllia L. also share the same father.

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[1] All further statutory references are to the Welfare and Institutions Code.

The Department of Children and Family Services (DCFS) filed a petition (§ 300) to detain Unesha L., Jamesha T., Jesse T., and Earl L.

On February 15, 2002, the juvenile court sustained a second amended petition and declared the children to be dependents.

A separate petition (§ 300) was filed by DCFS on behalf of Earllia L., who was born in early June 2002. The juvenile court sustained the petition, as amended, and declared her to be a dependent.

On September 18, 2002, Earllia L. was placed in the foster home of Betty G. Earl L., Jamesha T., and Jesse T., were already there. Unesha L. had been placed in another foster home.

At the May 9, 2003, hearing, the juvenile court terminated family reunification services and set the matter for a permanency plan hearing (§ 366.26). The court found Mother was not in compliance with the case plan and Father's compliance was only partial.

Betty G. informed DCFS that her intent was "absolutely [to] adopt Jesse [T.] and Jamesha [T.]," but her financial situation enabled her at that time only to adopt Earl L. and Earllia L. She explained her choice of legal guardianship for the other two siblings was based on advice that this plan would enable them to receive more educational benefits in light of their ages.

At the January 7, 2004 hearing, the juvenile court found a permanency plan of guardianship would be in the best interests of Jamesha T. and Jesse T. and appointed Betty G. their legal guardian.

Father, joined by Mother, opposed adoption as the permanency plan for Earl L. and Earllia L. and relied on the sibling exception. (§ 366.26, subd. (c)(1)(E)).

After finding the offer of proof was insufficient, the court denied Parents' request for a contested hearing. The court found Earl L. and Earllia L. were likely to be adopted and terminated parental rights.

DISCUSSION

I

Parents contend they were denied due process, because the juvenile court required an adequate offer of proof as a condition precedent to a contested hearing on the sibling exception. We conclude the request for an offer of proof was within the court's discretion.

"Of course a parent has a right to 'due process' at the hearing under section 366.26 which results in the actual termination of parental rights. This requires, in particular circumstances, a 'meaningful opportunity to cross-examine and controvert the contents of the [social worker's] report.' [Citations.] But due process is not synonymous with full-fledged cross-examination rights. [Citation.] Due process is a flexible concept which depends upon the circumstances and a balancing of various factors. [Citation.]" (*In re Jeanette V.* (1998) 68 Cal.App.4th 811, 816-817.)

"Because due process is, as we noted in *In re Jeannette V.*, *supra*, 68 Cal.App.4th 811, a flexible concept dependent on the circumstances, the court can require an offer of proof to insure that before limited judicial and attorney resources are committed to a hearing on the issue, [the parent] ha[s] evidence of significant probative value. If due process does not permit a parent to introduce irrelevant evidence, due process does not require a court to hold a contested hearing if it is not convinced the parent will present relevant evidence on the issue he or she seeks to contest. The [juvenile] court can therefore exercise its power to request an offer of proof to clearly identify the contested issue(s) so it can

determine whether a parent's representation is sufficient to warrant a hearing involving presentation of evidence and confrontation and cross-examination of witnesses." (*In re Tamika T., supra,* 97 Cal.App.4th 1114, 1122.)

The mother in *In re Tamika T.* relied on the strong parental relationship exception. (§ 366.26, subd. (c)(1)(A) [termination detrimental to child because parent maintained regular visitation and contact with child].) We know of no reason why our *In re Tamika T.* holding should not apply equally to the sibling exception. We therefore conclude that the juvenile court has discretion to require the parent(s) seeking a contested hearing on the sibling exception to make "an offer of proof to clearly identify the contested issue(s)" prior to determining whether a hearing is warranted. (97 Cal.App.4th at p. 1122.)

II

Mother contends the juvenile "court was premature in requesting the offer of proof from counsel since this was the first hearing that clarified the recommendations of DCFS for two separate plans of guardianship and adoption for these children." Her contention is not supported by the record.

On May 9, 2003, following a hearing, the juvenile court terminated family reunification services for Parents as to Earl L. and Earllia L. and ordered DCFS "to submit the adoptions process progress report form" and "to initiate an adoptive home study on the current caretaker." After noting "[t]here is a possibility of guardianship or adoption for all of the children[,]" the court continued the matter to September 10, 2003 for a permanency plan hearing (§ 366.26).

On September 10, the court continued the hearing to November 5 for Jamesha T. and Jesse T. and to January 7, 2004, for Unesha L., Earl L., and Earllia L.

At the November 5, 2003 hearing, the court stated the notice indicated guardianship was the recommendation for Jamesha T. and Jesse T. The DCSF attorney indicated adoption was the recommendation for all the children. The children's attorney clarified that the foster mother only wanted to adopt Earl L. and Earllia L. at that time and to adopt Jamesha T. and Jesse T. when they were 14 years old. She explained the court had informed Betty G. about the services which would be unavailable if she adopted Jamesha T. and Jesse T. at that time. The court responded, "I'll put Jamesha [T.] and Jesse [T.] over to January 7th. If it looks like we're going to do more than guardianship, it will probably have to go over, but we'll need a .26 report for [them for] January 7th." When offered the opportunity by the court, neither Father's attorney nor Mother's attorney asked to be heard regarding review of the permanency plan issues for any of the children.

On January 7, 2004, the court noted the recommendation for Earl L. and Earllia L. was "to terminate parental rights and proceed to adoption." DCFS's attorney informed the court Parents had proper notice. "They were personally served on November 13th, and they signed the copies of the notices."

These proceedings gave Parents adequate notice that January 7, 2004, was the date set for the permanency plan hearing for Earl L. and Earllia L. They were not caught unawares that on January 7 the court might decide to terminate their parental rights and free these children for adoption.

III

Parents contend their offer of proof was sufficient to trigger a contested hearing. They have failed to carry their burden.

"The issue of sufficiency of the evidence in dependency cases is governed by the same rules that apply to other appeals. If there is substantial evidence to support the findings of the juvenile court, we uphold those findings. [Citation.]

. . . . [W]e draw all reasonable inferences in support of the findings, consider the record most favorably to the juvenile court's order, and affirm the order if supported by substantial evidence even if other evidence supports a contrary conclusion. [Citation.] The appellant has the burden of showing the finding or order is not supported by substantial evidence. [Citation.]" (*In re. L. Y. L.* (2002) 101 Cal.App.4th 942, 947.)

Termination of parental rights and an order that the child be placed for adoption is the preferred choice at the permanency planning hearing. (*In re Celine R.* (2003) 31 Cal.4th 45, 53; § 366.26, subd. (c)(1).)

"If the court determines . . . , by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption." (§ 366.26, subd. (c)(1).)

The sibling exception applies where "[t]here would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption." (§ 366.26, subd.(c)(1)(E).)

It is undisputed that Earl L., Earllia L., Jamesha T., and Jesse T., shared a strong sibling bond. Moreover, the DCFS report for the January 7, 2004, permanency plan hearing indicated that these siblings had a close relationship. Jamesha T. considered herself responsible for her other siblings in Betty G.'s home and often expressed concern about their welfare. She wanted them all to remain together. Jesse T. enjoyed his siblings and had a special relationship with Earllia L. He often carried her and was the only one who could get her to smile

and stop crying on request. He was patient and kind towards Earl L., who looked up to him.

Nonetheless, it is not enough to show that the siblings have "close and strong bonds" and share "significant common experiences[.]" The party's burden is to demonstrate that severance of the sibling relationship would be detrimental to the adoptive child. (See, e.g., *In re Megan S.* (2002) 104 Cal.App.4th 247, 251; *In re L. Y. L., supra,* 101 Cal.App.4th 942, 952.)

The juvenile "court may reject adoption under this sibling relationship provision only if it finds adoption would be detrimental to the child whose welfare is being considered. It may not prevent a child from being adopted solely because of the effect the adoption may have on a sibling." (*In re Celine R., supra,* 31 Cal.4th at pp. 49-50.)

The DCFS attorney argued that Father could not make an adequate offer of proof for the sibling exception, because "[t]he court just granted guardianship to [Betty G.] of [Jamesha T. and Jesse T.], which means [these] children [and Earl L. and Earllia L.] are going to be in the same home and raised in the same home. There will be absolutely no disruption [of] that sibling bond."

The court asked what evidence Father had to support a sibling exception. Father's attorney first responded, "I'm not really ready at this point right now to go through each and every little category." When the court clarified that it meant witnesses or evidence, she stated that it was her intent to establish this exception at the contested hearing through the testimony of Jamesha T., Jesse T., and Earl L., who was five years old. She argued that she was "not really prepared at this point." She expressed her concern that although the four siblings were in the same home, there was "nothing guaranteeing" this situation would continue, because "something" might happen to terminate the legal guardianship, such as the

situation where the legal guardian "throws up her hands" when her wards become teenagers.

The juvenile court noted that another possibility was Earllia L., who was one year old, would be adopted by someone else if the present caretaker was unable to adopt her.

Mother did not make a separate offer of proof.

The minors' attorney informed the court that Betty G. had expressed a "clear desire" to adopt Jesse T. and Jamesha T. in the future but she thought legal guardianship at this juncture would give them more benefits for their educational needs.

After finding the offer of proof was insufficient, the court denied the request for a contested hearing. The court specifically found it was not enough that the four siblings shared a bond and common experiences, because they would remain together as placed. The court expressly ordered these four "children are not to be separated absent an emergency with notice to all counsel."

Father's attorney objected to the request for an offer of proof, reminding the court that she had "told [it] I wasn't really fully prepared to go forward with an offer of proof as to that point. Because there's certain things that have to be laid out that are specific in the cases, which I'm not prepared to go forward today."

The court overruled the objection. It explained that "[t]his is a further .26 hearing. [Father has] been very aware of where we've been heading." The court overruled Mother's objection on the same ground. The court found Earl L. and Earllia L. were likely to be adopted and terminated parental rights.

On appeal, Father argues his offer of proof demonstrated a minimum of two issues requiring a contested hearing. The first was whether "having some of the siblings in guardianship and others adopted" would result "in a substantial interference with their close sibling bonds" and their feeling of security, because it

was not certain that the children would remain together. The second, which he acknowledges was not raised by his counsel, is whether guardianship, rather than adoption, is the appropriate permanency plan. He argues the resolve of the foster mother to adopt Earl L. and Earllia L. is in question, because her willingness to adopt them was the product of a social worker's threat "to adopt or . . . the children would be shown at adoption fairs, on display."

Mother urges "the order [of termination must] be reversed and [the matter] remanded for [consideration of] a guardianship plan for Earl [L.] and Earllia [L.], or in the alternative, an evidentiary hearing on the sibling . . . exception[.]" She argues that "[u]ntil the foster mother felt pressured by DCF to adopt [Earl L. and Earllia L.], she preferred a guardianship plan for the four siblings." She also argues that allowing Earl L. and Earllia L. to be adopted would be detrimental, because Jamesha T. and Jesse T., who were not adopted, would treat them in a negative way which "may result in an emotional separation" of the siblings.

We do not find these arguments persuasive. Parents have failed to show their offer of proof justified a contested hearing on the sibling exception.

Their focus on the availability of Betty G. to adopt Earl L. and Earllia L. is misguided. The willingness of a particular foster mother to adopt the children is not a critical factor. "'The issue of adoptability . . . focuses on the minor, e.g., whether the minor's age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor. [Citations.]' (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649 . . . .) All that is required is clear and convincing evidence of the likelihood that adoption will be realized within a reasonable time. (*In re Jennilee T.* (1992) 3 Cal.App.4th 212, 223 . . . .)" (*In re Zeth S.* (2003) 31 Cal.4th 396, 406.) "Hence, it is not necessary that the minor already be in a potential adoptive home or that there be a proposed adoptive parent 'waiting in the wings.' [Citations.]" (*In re Sarah M., supra,* 22 Cal.App.4th at 1649.)

Parents do not contend Earl L. and Earllia L. are not adoptable. Rather, their position is adoption poses a risk of detrimental harm to these adoptive siblings from a serious disruption of their close bond with their siblings Jamesha T. and Jesse T. We disagree.

"A nonadoptive sibling's emotional resistance towards the proposed adoption may . . . implicate the interests of the adoptive child. In an appropriate case, the court should carefully consider all evidence regarding the sibling relationship as it relates to possible detriment to the adoptive child." (*In re Celine R., supra,* 31 Cal.4th 45, 55.) Parents' failure to raise this issue in their offer of proof precludes review of their claim.

In any event, a result more favorable to Parents would not have been reasonably probable if this issue had been raised. (*In re Celine R., supra,* 31 Cal.4th at p. 60 [prejudice test of *People v. Watson* (1956) 46 Cal.2d 818, 836 applies in dependency matters].)

Substantial evidence supports the juvenile court's finding that no detrimental harm would arise from the adoption of Earl L. and Earllia L., because they and Jamesha T. and Jesse T. would remain together as placed. The record reflects that at the time of the permanency plan hearing, the four siblings were placed in the foster home of Betty G., the prospective adoptive parent. No evidence was offered to show that this would not continue to be their placement or to dispute Betty G.'s announced intent to adopt Jamesha T. and Jesse T. in the future.

Mother argues that Jamesha T. and Jesse T. would take out their jealousy and resentment against Earl L. and Earllia L., who would be the legal, and thus, preferred children of Betty G. She fails to point to any evidence to support her argument. To the contrary, as Mother acknowledges, Jamesha T. was obtaining therapy to address her concerns about the different permanency plans and her anxiety about sibling separation. If Jesse T. displayed similar distress over the

adoption of his siblings, the juvenile court could order therapy for him as well. These measures would neutralize this risk of detriment to the adoptive siblings.

Finally, rejecting adoption as the permanent plan would not guarantee the four siblings would remain together. "If the court finds that adoption of the child . . . is not in the best interest of the child, because [the sibling exception] applies, the court shall either order that the present caretakers or other appropriate persons shall become legal guardians of the child or order that the child remain in long-term foster care." (§ 366.26, subd. (c)(1)(E) & (c)(4)(A).) There is no guarantee that the four siblings will stay together in the same foster home, and, as Parents recognize, there is no guarantee that a guardian will not terminate the legal guardianship before one or more of the siblings reaches majority. "'Guardianship, while a more stable placement than foster care, is not irrevocable, and thus falls short of the secure and permanent future [adoption] the Legislature had in mind for the dependent child.' [Citation.]" (*In re Celine R., supra,* 31 Cal.4th at p. 53.)

DISPOSITION

The order terminating parental rights is affirmed.

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EPSTEIN, Acting P.J.

We concur:

HASTINGS, J.

CURRY, J.